84-1462

No.-_____

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

RONALD E. JAMES,
Petitioner

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Pinedale, Ca. 93650
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23 pp

EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

1. Is Due Process secured by our Federal Constitution?

2. Do ministerial officers have the right to deny citizens Due Process of Law?

3. What is the root requirement for Due Process?

4. Does a plain, speedy and efficient remedy supersede Title 42 U.S.C. 1983?

5. Does Title 28 secs. 1343 and 1331 lay jurisdiction in Federal Court?

6. Is Petitioner forced to seek redress for damages in state court before being entitled to action under Title 42 U.S.C. 1983?

7. Would it be only the legislature of the State of California who may abrogate Petitioners statutory rights?

8. Is Petitioner entitled to a trial on the issues and for lack of Due Process, as affired by the 5th Amendment of the Constitution of the United States?

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CA. R. & T. Code, Sec. 18590, reads:

"Within 60 days after the mailing of each notice of additional tax proposed to be assessed the taxpayer may file with the Franchise Tax Board a written protest against the proposed additional tax, specifying in the protest the grounds upon which it is based."

CA. R. & T. Code, Sec. 18593, reads:

"The Franchise Tax Board's action upon the protest is upon the expiration of 30 days from the date when it mails notice of its action to the taxpayer, unless within that 30 day period the taxpayer appeals in writing from the action of the F.T.B. to the board."

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OPINION BELOW

The Opinion of the Court of Appeals is attached. (Appendix A)

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall..... be deprived of life, liberty, or property, without due process of law.....

The Fourteenth Amendment to the United States Constitution, also provides in pertinent part:

> ..... nor shall any State deprive any person of life, liberity,or property, without due process of law;.....

STATEMENT OF THE CASE

On August 3, 1981, the Petitioner, Ronald E. James, filed a Title 42 U.S.C. sec. 1983, Complaint for Damages in Federal District Court for the Eastern District of California. The complaint was filed for a Denial of Due Process of the California Revenue and Taxation Code. (All reference to the California Revenue and Taxation Code will be heretofore, (Ca. R. & T. Code)).

Jurisdiction was invoked, in Federal District Court, pursuant to Title 28 U.S.C. secs.1343 and 1331.

The Petitioner alleged in the complaint and by affidavit that he had received only four (4) unexecuted form letters. These four (4) unexecuted form letters were sent to petitioner through the postal service, by the California Franchise Board, heretofore(FTB).

The Petitioner received, (#1), an income tax instruction booklet for the year,1978. The Petitioner then received (#2), a "Notice of Income Tax Due", then,(#3), a "Final Notice Before Levy",and the last,(#4) was a "Notice of Tax Lien".

Petitioner wrote to the Respondent's, and made several attempts , via the postal service, informing them of their failure to send this Petitioner a ,"Notice of Proposed Assessment." Therefore depriving the Petitioner the right to a fair hearing and an opportunity to protest.

On October 15, 1981, oral arguments were heard in District Court, Fresno,Ca. on the motion to dismiss for lack of jurisdiction

Petitioner made oral arguments against the dismissal, (see recorders transcript, pages 4 through 12). The U.S. Magistrate took the matter under submission, and then on February 10, 1982, recommended that the case be dismissed for lack of jurisdiction.

On Dec. 30, 1982, United States District Judge, Edward Dean Price, concured with the U.S. Magistrate's recommendation.

The Petitioner appealed and the United States Court of Appeals for the Ninth Circuit upheld the judgement.

The Petitioner filed a timely petition for a rehearing and rehearing en banc and the appeals court rejected the petition.

ARGUMENT

The Petitioner has been deprived of a fair hearing and an opportunity to be heard by dening him the right to protest and appeal, in direct violation of the Fifth Amendment to our Constitution which requires due process of law.

The District Court and the Court of Appeals decided in error concerning the jurisdictional matter, when they declared that they were without jurisdiction to entertain petitioner's complaint, which is out of accord with the statutes 42 U.SC. 1983, 28 U.S.C. 1343 and 28 U.S.C. 1331. These statutes are valid laws of the United States, and also out of harmony with this court.

The Petitioner has relied on the Constitution of the United States, specifically the 5th and 14th Amendments, American Jurisprudence, California Jurisprudence, case law, California Government Code and the CA. R. & T. Code.

California legislature said that first there must be a "demand to file", CA. R. & T. Code, sec. 18648, and then they may issue a "notice of proposed assessment", that authority also comes from CA. R. & T. Code sec. 18648. At that point, the individual is entitled to 60 days in order to "protest" the "proposed assessment", CA. R. & T. Code sec. 18590. The FTB is required to consider the protest, CA. R. & T. Code sec. 18592. If the individual does not agree with the FTB, s action on the "protest", he is entitled to 30 days to appeal to the Board of Equalization, CA. R. & T. Code sec. 18593. The Board of Equalization is required to consider the appeal, CA. R. & T. Code sec. 18595. The Board of Equalizations decision becomes final 30 days after their decision, CA. R. & T. Code sec. 18596. This 30 day grace period was put into the statute so the individual could institute a proceedings in a court of competant jurisdiction to stay the collection, CA. R. & T. Code sec. 19081.

By all the above, the California legislature carefully preserved Due Process of Law.

Because of the blatant disregard of petitioner's due process rights , the respondent's deprived this petitioner his right to protest and appeal, the respondent's acted outside their scope of authority. As explained in the reporter's transcript, Oct. 15, 1981, at page 2 ,line 6 thru 14 where Mr knight, attorney representing respondents, told the court that,....."some mail had been returned from the Pine Grove address....." Mr. Knight didn't say what mail, just "some mail", regardless, the respondent's shot circuited petitioner's statutory procedural rights.

Joint Anti-Fascist Refugee Committee v. McGrath, 71 S. Ct. 624, at page 630:

> ".....Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it."

The petitioner holds that the respondent's acted in complete contridiction of the CA. R. & T. Code, the Constitution of both the United States and California.

California Government Code sec.820 is very clear as put forth in Johnson v. Duffy 588 F 2d. 740 (1980) in these words:

> " However, California law expressly imposes liability on a public employee for his own act or omission."

Petitioner has stated all along in his pleadings that the respondents had acted in reckless disregard and omission in dening petitioner his due process rights. Therefore, acting without adequate determining principle, and absolute abuse of their discretion.

This suit was filed in Federal Court and jurisdiction of the court was under 28 U.S.C. sec. 1343 and 1331. The complaint stated a claim arising under the Federal Constitution, one that isn't merely superficial or frivolous, but is substantial. See: Hagans v. Lavine, 415 U.S 528, (1974), Silva v. Vowell, 621 F 2d. 640,645 (1980)

The denial was an invidous contravention of the 5th and 14th amendments due process clause.

The respondent's argue that petitioner was provided a plain, speedy and efficient remedy through the Calif. Cts. After reading petitioner's pleadings, how could anyone take for granted that the petitioner did have that opportunity? The Anti-injunction Act does not apply here at all. This is not a tax case, this case is a strict case of Denial of Due Process. The petitioner isn't attacking the constitutionality of a tax, he is attacking the malicious assault on his constitutional safeguards.

Respondents damaged petitioner and once the damage was done, a simple discontinuance of the hold on property surely didn't heal the harm it caused, the damage had already been done. See: "Plaintiffs Objection to Magistrates Recommendation", page 2, line one.

All the authorities cited by respondents are tax cases, or cases against the

state, or some case completely way off course, not pertaing to this suit at all, as shown in petitioners argument in, "Plaintiff's Objection to Magistrates Recommendation", pages 3-4-5 & 6.

It's very obvious that the lower Federal Ct. and Appeal Ct. would let the state deny another or more people due process of law and uphold that very doctrine. The District Ct. and Appeal Ct. has departed in this case from the principles established by, Davis v. Passman, 442 U.S 228,(1979), at page 246, where Justice Brennan gave the opinion of the Court, said: "As Butz v. Economou stated only last term:

> "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
> "' No man in this courtry is so high that he is above the law....."U.S. v. Lee 106 U.S. 196 (1882).

and as far back as 1883 in Hagar v. Reclamation Dist.#108, 111 U.S.701.

Justice Brennan in delivering the opinion of the Court, in, Carlson v. Green, 100 S. Ct. 1468, (1980) at page 1475, stated:

> "A state official comtemplating illegal activeity, must always be prepared to face the prospect of a Sec. 1983 action being filed against him."

By not adhering to the statutes and the law of the land, respondents were not constant with controlling authority. See: Beck v. Ransome-Crummey Co., 42 Cal. App. 674, (1919), Simon v. Croft, 182 U.S. 431(1900), Duncan v. State of Missouri, 152 U.S. 377,(1893), and McMillen v. Anderson, 95 U.S. 37,(1877).

CONCLUSION

Petitioner believes there is a Federal question arising under the Constitution of the United States and prior decisions of this Court, and furnishes compelling reason for granting this Writ of Certiorari to review the judgement and opinion of the lower Cts.

Respectfully submitted,

Ronald E. James, Pro Se
P.O. Box 3131
Pinedale, Ca. 93650
(209) 439-0485

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of this Writ of Certiorari have been served by mail to respondents, on this 18th day of January, 1985.

Ronald E. James, Pro Se
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(209) 439-0485

APPENDIX A

RONALD E. JAMES,
Plaintiff-Appellant,

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Defendants-Appellees.

No. 83-1634
D.C. #CV-F-81-257-EDP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Submitted:* Feb. 10, 1984

Filed: Apr. 6, 1984

MEMORANDUM

Appeal from the District Court of the United States for the Eastern District of California.

Before: Choy, Pregerson, and Canby, Circuit Judges.

James appeals the district court's dismissal of his Sec. 1983 action for damages. James alleged that he was deprived of due process because he did not have an opportunity to protest a Franchise Tax Board assessment. The district court dismissed for lack of jurisdiction.

The Tax Injunction Act, 28 U.S.C. Sec. 1341, deprives the federal courts of jurisdiction over Sec. 1983 actions when there is a plain, speedy, and efficient remedy in state court.

Comenout v. Washington, 722 F.2d 574 (9th Cir. 1983). The refund action provided by California Personal Income Tax Law is a plain, speedy, and efficient remedy such as to invoke the restraints of Sec. 1341. Randall v. Franchise Tax Board, 453 F.2d 381 (9th Cir. 1971); Aronoff v. Franchise Tax Board, 348 F.2d 9 (9th Cir. 1965). James can pay the assessment and pursue a refund action in the California courts. The district court properly found subject matter jurisdiction lacking and dismissed the action.

Accordingly, the judgment is affirmed.1/

Footnotes

* The panel is unanimously of the opinion that oral argument is not required in this case. Fed. R. App. 34(a).

1/ The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21, of the Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoingpublication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

APPENDIX B

RONALD E. JAMES,
Plaintiff-Appellant,

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Defendants-Appellees.

No. 83-1634
D.C. #CV-F-81-257-EDP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT. 31, 1984

ORDER

BRFORE: CHOY, PREGERSON, and CANBY,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc.
Fed. R. APP.P.35 (b).

The petion for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

RONALD E. JAMES
Plaintiff-Appellant,

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Defendants-Appellees.

No. 83-1634
DC # F-81-0257 EDP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV. 29, 1984

ORDER

ORDER - ON MOTION FOR STAY OF MANDATE

Appellant's motion for a stay of the mandate is granted. Issuance of the mandate is stayed until December13, 1984. See Fed. R. App. P. 41(b).

No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

RONALD E. JAMES,
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G. ALAN HUNTER and
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Respondent

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

RONALD E. JAMES,
Petitioner

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Respondent

SUPPLEMENTAL APPENDIX
TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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SUPPLEMENTAL APPENDIX

RONALD E. JAMES
Plaintiff-Appellant,

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Defendants-Appellees.

No. CV-F-81-257-EDP

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FILED
DEC. 30, 1982

ORDER RE MAGISTRATE'S RECOMMENDATION

The Magistrate has previously filed his recommendation that the defendant's motion to dismiss the plaintiff's complaint be granted. The plaintiff filed timely objections to the Magistrate's recommendation, and the defendants responded thereto in timely fashion.

The court has condidered the matter de novo, and has read the wirtten submissions by the respective parties. After due consideration, the court concurs in the Magistrate's recommendation.

The court orders the attorneys for the defendants to prepare and submit a form of written judgment within 20 days from the date of this order.

DATED: December 30, 1982

SUPPLEMENTAL APPENDIX

RONALD E. JAMES
Plaintiff-Appellant,

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Defendants-Appellees.

No. CV-F-81-257-EDP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FILED
JAN 24 1983

JUDGMENT

This case came on regularly to be heard on defendant's motion to dismiss action on the grounds that the court lacks jurisdiction and, in the alternative, on the grounds that the court should abstain from further proceeding since the action involves primarily questions of the interpretation of tax laws of the State of California. After considering the matter de novo, this Court on December 30, 1982 issued its Order reflecting that it concurs in the February 10, 1982 Magistrate's Recommendation of Defendant's

Motion to Dismiss. Said Magistrate's Recommendation concluded that it was necessary to consider only one of the number of alternative grounds urged by defendants, and concluded that the federal courts are without jurisdiction to entertain the action.

Now, on motion od defendants, it is adjudged and decreed that the complaint be, and the same hereby is, dismissed for want of jurisdiction, and that defendants recover their costs.

Dated: Jan. 24, 1983

No. 84-1462

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

RONALD E. JAMES,
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v.

G. ALAN HUNTER and
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Respondent

SUPPLEMENTAL APPENDIX
TO
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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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(3)

No. 84-1462

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RONALD E. JAMES,
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Respondents

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Does the United States District Court have jurisdiction of an action asserting civil rights violations as a result of alleged acts of state tax officials depriving petitioner/plaintiff of an opportunity, under state law provisions, to protest a tax assessment,

(1) where there is a plain, speedy, and efficient remedy in state court to review the assessment; and

(2) given the bar of the Eleventh Amendment?

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Respondents

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JURISDICTION

Petitioner cites 28 U.S.C. section 1254(1), which section does provide, as a general rule, the basis on which jurisdiction of this Court is invoked in a petition for writ of certiorari. Section 1254 does *not,* however, establish jurisdiction for the *district court*—indeed the district court properly concluded that it lacked jurisdiction of this action against state officials for acts performed in their capacity as tax administrators. This Court, should it

review the matter, must also deny the jurisdiction of the courts of the United States, where, as here, such jurisdiction does not affirmatively appear in the record on which it is called to act. (*Parker v. Ormsby* (1891), 141 U.S. 81, 11 S.Ct. 912, 35 L.Ed. 654; see also *King Iron Bridge, etc. Co. v. Otoe County* (1887), 120 U.S. 225, 7 S.Ct. 552, 30 L.Ed. 623.)

STATEMENT OF THE CASE

By a Complaint for Damages filed August 3, 1981 in the United States District Court for the Eastern District of California (E.R.[1] Doc. No. 1), petitioner sought, inter alia, damages and an injunction restraining enforcement of a State of California Franchise Tax Board (hereinafter "Board") lien. Respondent G. Alan Hunter is Director of the Collection Bureau of the Board (see E.R. Doc. No. 1, Exh. H) and respondent Gerald Goldberg is the Executive Officer of the Board. All respondents are agents of the Board (E.R. Doc. No. 1, ¶ III).

A motion to dismiss was filed by respondents on August 31, 1981 (E.R. Doc. No. 7), on the grounds, inter alia, that the federal courts lack jurisdiction by virtue of the bar of the Eleventh Amendment and 28 United States Code section 1341.

On September 3, 1981, the district court issued an order denying petitioner's motion for a restraining order

1. Excerpts of Record filed with Ninth Circuit Court of Appeals will be referred to herein as "E.R." Petitioner has apparently chosen not to bring the entire record before this Court.

and a preliminary injunction (E.R. Doc. No. 9). Thereafter, on December 30, 1982, the Honorable Edward Dean Price, United States District Judge, after considering the matter de novo, issued an order approving the February 10, 1982 Magistrate's Recommendation on respondents' Motion to Dismiss (Suppl. Appen. to Petn. for Writ of Certiorari). The court's order directed dismissal of petitioner's action since the existence of a refund action, such as is provided by the California Personal Income Tax Law—which is a "plain, speedy and efficient remedy"—leaves the federal courts without jurisdiction to entertain petitioner's action. The court therefore found it unnecessary to consider the alternative grounds urged by respondents in support of their motion for dismissal.

Judgment dismissing petitioner's action was filed January 24, 1983 and entered January 24, 1983 (E.R. Doc. No. 18). Plaintiff's notice of appeal was then filed January 24, 1983 (Suppl. Appen. to Petn. for Writ of Certiorari).

The Ninth Circuit Court of Appeals affirmed the district court's dismissal of the action by an unpublished "memorandum" opinion filed April 6, 1984 (Appen. to Petn. for Writ of Certiorari).

———o———

SUMMARY OF ARGUMENT

The federal courts lack jurisdiction to entertain petitioner/plaintiff's action against State of California officials, pertaining to a tax assessment for which a state court remedy is available. The principle of comity bars petitioner's action (*Fair Assessment in Real Estate*

Ass'n. v. McNary (1981), 454 U.S. 100, 116, 102 S.Ct. 177, 70 L.Ed.2d 271) since California's administrative and judicial remedies for review (Cal. Rev. & Tax. Code, §§ 19081 et seq., 18590 et seq. and 19051 et seq.) are clearly "plain, speedy and efficient." (*Rosewell v. LaSalle Nat. Bank* (1981), 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed. 2d 464.) Also, both the "Tax Injunction Act" (28 U.S.C. § 1341) and the Eleventh Amendment of the United States Constitution unquestionably deprive the federal courts of jurisdiction of petitioner's action. The district court dismissal was proper and the petition before this Court should be denied.

ARGUMENT

Introduction

The Ninth Circuit Court of Appeals properly affirmed the decision which dismissed petitioner's action, relying on only one of several meritorious grounds which were asserted by respondents. The federal courts clearly lack jurisdiction to entertain actions against state tax officials for conduct, as alleged in petitioner's complaint, pertaining to a state tax assessment for which a plain, speedy, and efficient remedy exists in state court.

Petitioner argues, as he did in the lower courts, the general proposition that federal courts have jurisdiction to entertain civil rights actions for denials of due process. Petitioner fails, however, to establish that the federal courts have jurisdiction to entertain such an action against State of California officials, pertaining to a tax assessment for which a state court remedy is clearly available.

The principle of comity bars the action. Both 28 United States Code section 1341 and the Eleventh Amendment of the United States Constitution also unquestionably deprive the federal courts of jurisdiction of petitioner's action. The district court dismissal was proper, and the petition before this Court should be denied.

I.

PETITIONER'S ACTION WAS PROPERLY DISMISSED SINCE THE FEDERAL COURTS LACK JURISDICTION.

A. The Principle Of Comity Bars Petitioner's Action.

The principle of comity serves as a bar to federal courts granting damages relief in state tax cases, including a Civil Rights action. In the words of this Court,

> "[W]e hold that taxpayers are barred by the principle of comity from asserting [42 U.S.C.] § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete [fn. omitted], and may ultimately seek review of the state decisions in this Court." (*Fair Assessment in Real Estate Ass'n. v. McNary, supra,* 454 U.S. 100.)

The California Revenue and Taxation Code provisions provide a readily available and wholly effective administrative mechanism and state court judicial remedy for aggrieved taxpayers. Taxpayers have available a state court refund action to obtain judicial review of their constitutional claims. (Cal. Rev. & Tax. Code, § 19081 et seq.; see also Cal. Rev. & Tax. Code, §§ 18590 et seq. [available prepayment administrative remedy of "protest," hear-

ing, etc.] and 19051 et seq. [administrative claim for refund procedure].)

California's remedies are clearly "plain, speedy and efficient." (*Rosewell v. LaSalle Nat. Bank, supra,* 450 U.S. 503.) In *Rosewell,* this Court rejected the claim that an Illinois remedy was inadequate because the taxpayer had to pay an assessment on his property before obtaining a hearing on his contention that the assessment was unlawful, because the process took two years, and because the state did not pay a successful protestant interest on the wrongfully collected assessments. The court, in rejecting the contention of inadequacy of state remedy, quotes a Senate report on the Tax Injunction Act evidencing that Congress knew that many states provided a refund action as the "exclusive remedy" for the erroneous or wrongful collection of taxes, which remedy Congress intended to constitute the standard for "plain, speedy and efficient" remedies.

As noted above, California provides *both* prepayment administrative remedies (which is where petitioner contends his rights were violated) (Cal. Rev. & Tax. Code §§ 18590 et seq. and 19051 et seq.) and a state judicial refund action for review of such contentions. (Cal. Rev. & Tax. Code, § 19081 et seq. These procedures, which are virtually identical to the procedures reviewed by this Court in *California v. Grace Brethren Church* (1982), 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93, have been consistently held, as a matter of law and without a single instance of deviation, to be plain, speedy and efficient. (*Capitol Industries-EMI, Inc. v. Bennett* (9th Cir. 1982), 681 F.2d 1107; *Aronoff v. Franchise Tax Board of the State of California* (9th Cir. 1965), 348 F.2d 9; *Randall v. Fran-*

chise Tax Board of State of California (9th Cir. 1971), 453 F.2d 381; see also *Corbett v. Printers & Publishers Corporation* (9th Cir. 1942), 127 F.2d 195, 197.) *Rosewell* similarly dictates this conclusion.

Accordingly, since petitioner failed to exhaust his available state administrative and judicial remedies, his action in federal court was properly dismissed for lack of jurisdiction.

B. 28 United States Code Section 1341 Bars The Federal District Courts From Hearing The Instant Case.

The existence of a refund action, as provided by the California Personal Income Tax Law,[2] also invokes the restraint of the "Tax Injunction Act," 28 United States Code section 1341. The provisions of section 1341 also deprive the federal courts of jurisdiction. (*Rosewell v. LaSalle Nat. Bank, supra,* 450 U.S. 503; *Kelly v. Springett* (9th Cir. 1975), 527 F.2d 1090, 1093-1094; *Bland v. McHann* (5th Cir. 1972), 463 F.2d 21, cert. den. (1973) 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700.)

C. The Principles Of Federal Equity Also Dictate The Withholding Of Relief.

In any event, the district court properly abstained from accepting jurisdiction in this case where more than adequate administrative and judicial state remedies are available to the taxpayer. (*Great Lakes Dredge & Dock Co. v. Huffman* (1943), 319 U.S. 293, 63 S.Ct. 1070, 87

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2. The refund action is applicable to taxes collected by withholding in issue in this case. (Cal. Rev. & Tax. Code, § 18820.)

L.Ed. 1407.) This principle of federal equitable jurisdiction which restrains the federal court from interference with the internal fiscal operations of the state is applicable to actions brought under section 1981 et seq. of 42 United States Code. (*Fair Assessment in Real Estate Ass'n. v. McNary, supra,* 454 U.S. 100.)

D. The Eleventh Amendment To The United States Constitution Also Deprives The Federal Courts Of Jurisdiction.

Unchanged since its adoption in 1798, the Eleventh Amendment to the United States Constitution provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This Court has consistently held that an unconsenting state is immune from suits brought in federal court by her own citizens as well as by citizens of another state. (*Hans v. State of Louisiana* (1890), 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842; *Duhne v. New Jersey* (1920), 251 U.S. 311, 40 S.Ct. 154, 64 L.Ed. 280; *Great Northern Life Ins. Co. v. Read* (1944), 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121; *Parden v. Terminal R. of Ala. State Docks Dept. Co.* (1964), 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233; *Employees v. Dept. of Public Health and Welfare* (1973), 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251.) It is also well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Co. v. Dept.*

of Treasury (1945), 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389, this Court said:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (*Id.*, at p. 464.)

Thus, the rule has evolved that a suit by private parties seeking to impose a liability which ultimately will be paid from public funds in the state treasury is barred by the Eleventh Amendment. (*Great Northern Life Inc. Co. v. Read, supra,* 322 U.S. 47; *Kennecott Copper Corp. v. Tax Comm'n* (1946), 327 U.S. 573, 66 S.Ct. 745, 90 L.E. 861.)

As petitioner alleges, respondents are employees of the California Franchise Tax Board. As is evident from the complaint, the complained-of-conduct by the respondents occurred while respondents were carrying out their duties as state employees. In such an action, while the individual may be named as a nominal defendant, the State of California treasury will to a virtual certainty be responsible for any judgment which may be granted to plaintiff. (Cal. Gov. Code, § 825.) Absent a waiver by the State of California, the Eleventh Amendment is, therefore, a bar to petitioner's action.

1. There Has Been No Waiver By California Of Eleventh Amendment Protection.

In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, this Court has held that a waiver will be found only where stated "by the most express language, or by such over-

whelming implication from the text as [will] leave no room for any other reasonable construction." (*Murray v. Wilson Distilling Co.* (1909), 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742.) As stated in the court's decision in *Edelman v. Jordan* (1974), 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662:

> "We see no reason to retreat from the Court's statement in *Great Northern Life Insurance Co. v. Read,* 332 U.S., at 54 . . . (footnote omitted):
>
> > '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'"

To the extent that the State of California administers the personal income tax law, it clearly has not waived such immunity. To the contrary, the state has established in state courts a "plain, speedy, and efficient remedy" for determining whether taxes have been erroneously or illegally collected or computed. (Rev. & Tax Code, §§ 19051 et seq., 19081 et seq.; *Aronoff v. Franchise Tax Board, supra,* 348 F.2d 9; *Randall v. Franchise Tax Board, supra,* 453 F.2d 381; see also Cal. Gov. Code, § 860.2.) Petitioner therefore cannot meet his burden of establishing that the State of California has waived its immunity from this kind of suit, or this particular suit, in federal court. (*Murray v. Wilson Distilling Co., supra,* 213 U.S. 151, 172-173; *Whitner v. Davis* (9th Cir. 1969), 410 F.2d 24, 29; *Clark v. State of Washington* (9th Cir. 1966), 366 F.2d 678, 680.)

2. The Eleventh Amendment Bar Is Applicable To Section 1983 Civil Rights Actions.

The fact that petitioner/plaintiff brought this suit in part under 42 United States Code section 1983 et seq. is

of no consequence insofar as the bar of the Eleventh Amendment is concerned.[3] It is now firmly established that section 1983 does not constitute an abrogation of the Eleventh Amendment immunity of the states. In *Quern v. Jordan* (1979), 440 U.S. 332, 99 S.Ct. 1139, 39 L.Ed.2d 338, this Court concluded that Congress did not intend by the general language of section 1983 "to override the traditional sovereign immunity of the States." (*Id.* at p. 341 (relying on *Alabama v. Pugh* (1978), 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (per curiam) and *Edelman v. Jordan, supra,* 415 U.S. 651).)

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari herein be denied.

Respectfully submitted,

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3. To the extent petitioner/plaintiff bases his claim on violations of *state law* (see, Petn. for Writ herein, p. 6), his claim is, of course, also barred by the Eleventh Amendment. (*Pennhurst State School & Hosp. v. Halderman* (1984) — U.S. —, 104 S.Ct. 900, 909-911, 79 L.Ed.2d 67, 80-82.)